
CONGRESS ERRS IN DEREGULATING BROADCAST OWNERSHIP CAPS: MORE MONOPOLIES, LESS LOCALISM, DECREASED DIVERSITY AND VIOLATIONS OF EQUAL PROTECTION

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As early as 1815, legislative critics realized that even Congress, "clothed with every power that ought to be desired, with abundant means for a wise and provident government," could "fall into the mistakes of short sighted man."¹ Nonetheless, over one hundred years later, Senator Pepper reminded the world that the "English speaking people have found it wise to place their trust in the Legislature, subject only to constitutional restraints."² Merging the critic's warning with Senator Pepper's declaration, Congress errs when it produces short-sighted legislation or contravenes the Constitution. Unfortunately, Congress fell into both pitfalls in relaxing the limitations on broadcast ownership via the Telecommunication Act of 1996 (the 1996 Act).³

Restraints on the number of broadcast stations one party may own, both at the national and local level, have been enforced by the Federal Communications Commission ("FCC" or "Commission") for decades.⁴ These restrictions exist to serve two

objectives: (1) furthering the First Amendment ideal of promoting the public welfare by providing diverse and antagonistic viewpoints;⁵ and, (2) promoting competition in order to ensure efficient use of resources.⁶

Despite the paramount importance of the above objectives, Congress significantly loosened the limitations on broadcast ownership⁷ in the 1996 Act.⁸ In so doing, the collective Legislature has personified the "short-sighted man." The results of this Congressional myopia are threefold. First, the proffered purpose of the 1996 Act, to increase competition,⁹ is not mirrored in the effects of relaxed ownership restrictions. Specifically, the result of the intended pro-competitive legislation is an increase in monopolies and a centralization of control.¹⁰ As a result, Congress is legislating in the private interest and deviating from its own mandate to the FCC to regulate in the public interest.¹¹ This centralized ownership of broadcasting facilities leads to two further det-

¹ U.S. v. Bryan and Woodcock, 13 U.S. 374, 378 (1815).

² Myers v. U.S., 272 U.S. 52, 79 (1926).

³ Telecommunication Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56 (codified at 47 U.S.C.A. § 151 (West Supp. 1996)).

⁴ *In re Review of the Commission's Regs. Governing Television Brdcast., Further Notice of Proposed Rule Making*, 10 FCC Rcd. 3524, para. 2 (1995) [hereinafter 1995 FNPRM].

⁵ *Id.* para. 57.

⁶ *Id.* para. 15.

⁷ For purposes of this paper, "ownership" as defined as "directly or indirectly owning, operating, or controlling" so as to qualify as an attributable interest as defined in 47 C.F.R. § 73.3555 note 2 (1996) (setting forth the criteria for when an interest in a broadcast license counts in calculating the number of stations owned by one entity). A related issue, which is beyond the scope of this article, is whether the Federal Communication Commission (FCC or Commission) should attribute interests in local marketing agreements (LMAs), contracts under which brokers lease blocks of time

from broadcast licensees and then program the leased time and sell advertising to support the program. *In re Review of the Commission's Regs. Governing Television Brdcast., Second Further Notice of Proposed Rule Making*, MM Docket No. 91-221, FCC 96-438, para. 80 (Nov. 7, 1996) [hereinafter 1996 Second FNPRM]. Presently, the Commission does not attribute television LMAs in calculating ownership caps. *Id.* Radio LMAs, however, are attributable if the two parties to the LMA are radio stations in the same market and the broker programs more than 15% of the station's weekly time. *Id.* The FCC is currently seeking comment on whether television LMAs should be attributable, and if so, whether existing LMAs be grandfathered from the new attribution rules. *Id.* para. 92.

⁸ The 1996 Act, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C.A. § 151 (West Supp. 1996)).

⁹ *Id.* (The purpose statement reads "An Act to promote competition . . .").

¹⁰ See *infra* notes 111-126 and accompanying text.

¹¹ In the Communications Act of 1934, Congress created the FCC "to execute and enforce the provisions of [The 1934

rimental effects: less localism¹² and decreased diversity.¹³

In addition to suffocating broadcasting ideals, the 1996 Act violates the Equal Protection Clause of the Constitution¹⁴ by imposing disparate ownership limitations upon radio and television.¹⁵ Although radio and television are similarly situated, Congress is preferring radio's purely aural messages over television's audio-visual communications by allowing the former messages greater audience penetration nationwide.¹⁶

Part I of this note traces the history of the five ownership restrictions most purely affecting broadcasting – national ownership caps on radio, national ownership caps on television, local ownership caps on radio, local ownership caps on television, and the one-to-a-market rule banning intra-market ownership of a television and radio station.¹⁷ Part II explains the changes in each of these five areas as a result of the 1996 Act. The aforementioned Congressional errors of short sighted legislation and equal protection violations are discussed in Parts III and IV, respectively.

I. BROADCAST OWNERSHIP LIMITATIONS BEFORE THE 1996 ACT

The FCC launched its broadcast ownership con-

trol efforts in 1940 by prohibiting "the issuance of a license to anyone already possessing a license in the same broadcast service unless the applicant could demonstrate that the issuance of the license (1) would have a pro-competitive impact, and (2) would not result in the concentration of control of broadcasting facilities in a manner inconsistent with the public interest."¹⁸ The Commission, however, immediately abandoned this pliable standard and journeyed into the turbulent world of absolute limits, as described below.

A. National Ownership Limits on Radio

The first quantifiable limit, announced in 1940, placed on the national common ownership of FM radio outlets was six stations.¹⁹ Perhaps sensitized by the Supreme Court's 1945 determination that the First Amendment to the Constitution "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,"²⁰ the Commission established a de facto limit of seven on the national ownership of AM radio stations in 1946.²¹ Specifically, the FCC denied CBS' application for an eighth station stating "it's against the public interest to permit a concentration of control of broadcasting facilities in any sin-

Act].” 47 U.S.C. § 151 (1994). In enumerating the powers of the Commission, Congress required the FCC's regulations to be in the "public convenience, interest, or necessity." 47 U.S.C. § 303 (1994).

¹² See *infra* notes 127-138 and accompanying text.

¹³ See *infra* notes 139-152 and accompanying text.

¹⁴ The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids any state from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Although the Fifth Amendment, which applies to the Federal Government as opposed to the states, does not expressly contain an equal protection clause, the Supreme Court has held that the Federal Government is subject to the same equal protection requirements of the states. "It would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling v. Sharpe*, 347 U.S. 497, 500 (1953). "(T)he due process clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Washington v. Davis*, 426 U.S. 229, 236 (1976). Equal protection analysis is the same under the Fifth Amendment as under the Fourteenth Amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

¹⁵ See *infra* notes 156-165 and accompanying text.

¹⁶ *Id.* Although the FCC's ownership restrictions have also treated radio and television owners differently, and consequently violated the Constitution's equal protection clause

by preferring one medium over the other, this article focuses only on the Legislature's recent actions and the current state of the law for purposes of the equal protection analysis.

¹⁷ 47 C.F.R. § 73.3555 (1995) (amended by the 1996 Act, Pub. L. No. 104-104, § 202, 110 Stat. 56 (codified at 47 U.S.C.A. § 151 (West Supp. 1996))). Other ownership restrictions involving broadcasting, as it relates to other mediums, are: (1) the daily newspaper cross-ownership rule (47 C.F.R. § 73.3555(d) (1996)); (2) the rules governing affiliation of a television broadcast station and entities maintaining networks of television broadcast stations (47 C.F.R. § 73.658(g) (1996)); and (3) the restrictions on cross ownership or control of cable systems and broadcast networks (47 C.F.R. § 76.501 (1996)). This note is only concerned with the five ownership restrictions solely involving broadcasting. The 1996 Act, however, also lessens restrictions on the aforementioned regulations. Pub. L. No. 104-104, § 202, 110 Stat. 56 (codified at 47 U.S.C.A. § 151 (West Supp. 1996)).

¹⁸ 1995 *FNPRM*, *supra* note 4, para. 2.

¹⁹ 5 Fed. Reg. 2382, 2384 (1940).

²⁰ *Associated Press v. U.S.*, 326 U.S. 1 (1945).

²¹ *In re Sherwood B. Brunton, Decision*, 11 F.C.C. 407, 413 (1946). The FCC did not impose an absolute limit on AM station ownership as it held that, with respect to AM, concentration of control "is not a factor of the absolute number of stations alone but depends also upon the character of the facilities involved, e.g., the powers and the frequencies of the stations." *Id.*

gle person or organization."²²

Seven years later, the FCC expanded its rationale, citing two reasons for placing restrictions on broadcast ownership. First, diversity of ownership would provide diverse sources of information.²³ Second, the Commission sought to safeguard against undue concentration of economic power.²⁴ The FCC determined the above objectives would be realized by limiting a single entity's ownership to seven AM and seven FM stations.²⁵

Although this "Rule of Seven" remained the status quo for over three decades, the FCC did not remain dormant in its consideration of ownership caps.²⁶ In 1984, when the FCC did act, its proposal took a turn toward total deregulation. Convinced that the goals of diversity and competition were no longer being realized through ownership caps,²⁷ the Commission ordered a complete repeal of its national ownership ceilings, to be effective in 1990.²⁸

In response to its extremist action, the FCC received eight petitions from industry requesting it

reconsider its decision.²⁹ Upon review of industry's comments, the FCC affirmed its earlier conclusion that repeal of the "Rule of Seven" was in the public interest; however, it decided that the proposed complete abandonment of the ownership caps was not integral to the effectuation of its goals.³⁰ As a result, a single entity was henceforth permitted to own up to twelve AM and twelve FM stations nationally.³¹ In justifying its move from seven to twelve, the FCC held that while diversity remained an important consideration, it was not to function to the exclusion of other considerations, such as the benefits of group ownership.³²

In 1991, the FCC accepted its own invitation and considered the increase in competition provided by a multitude of non-radio sources as a reason to consider allowing an individual to own a greater assemblage of stations in order to benefit from economies of scale.³³ This philosophy remained far more constant than the FCC's implementation, as evidenced by the happenings over the next three years.³⁴ The ultimate result of this

²² *Id.*

²³ *In re Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regs. relating to Multiple Ownership of AM, FM and Television Brdcast. Stations, Report and Order*, 9 Rad. Reg. (P & F) 1563, para. 10 (1953).

²⁴ *Id.*

²⁵ *Id.* para. 17.

²⁶ *In re Amendment of Section 73.35555 (formerly Sections 73.35, 73.240, and 73.636) of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Brdcast. Stations, Report and Order*, 100 F.C.C.2d 17, para. 18 (1984) [hereinafter *1984 Report and Order*]. "Since 1954 the Commission has several times revisited the Seven Station Rule, but only to question whether an absolute numerical limit, rather than geographic or nature of service limits, was the most appropriate form of regulation." *Id.*

²⁷ *Id.* para. 108. The Commission believed: the record . . . convincingly establishe[d] that the appropriate market for ideas is primarily local, and includes a broad variety of means of communications, especially cablecasting, newspapers, and opinion magazines, in addition to radio and television; that, to the extent the idea market is a national one, it is sufficiently diverse so as to be unaffected by a change in the Seven Station Rule; and that network and group owners contribute to viewpoint diversity through the quality and quantity of their public-affairs programming. Further, the record establishe[d] that there is no danger of excessive economic concentration in the relevant competitive markets, and that there are potential efficiency gains from repeal of the rule.

Id.

²⁸ *Id.* paras. 109-110. Recognizing the need for "prudence and caution" in the rapidly changing broadcast industry, the Commission instituted a six year transitional period during which common ownership for each broadcast service would be capped at 12. At the end of the fixed six year pe-

riod, the national ownership caps would be automatically abandoned in full. *Id.*

²⁹ *In re Amendment of Section 73.3555 (formerly Sections 73.35, 73.240 and 73.636) of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Brdcast. Stations, Memorandum Opinion and Order*, 100 F.C.C.2d 74, para. 1 (1985) [hereinafter *1985 Memorandum Opinion and Order*].

³⁰ *Id.* paras. 30 and 49.

³¹ *Id.* para. 53. The national ownership limit was increased to 14 for those acquiring cognizable interests in minority owned and controlled broadcast stations. *Id.*

³² *Id.* paras. 35 and 51. The Commission "reject[ed] the notion that [it] must consider diversity to the exclusion of other important considerations in assessing the need to retain a national multiple ownership rule. Rather, in determining the approach which best serves the public interest, [the FCC's] responsibility is to balance considerations of diversity with other important regulatory goals." *Id.* para. 51. See *infra* note 33 discussing the benefits of increased group ownership.

³³ *In Re Revision of Radio Rules and Policies, Notice of Proposed Rule Making*, 6 FCC Rcd. 3275, para. 3 (1991) [hereinafter *1991 NPRM*]. The FCC found it necessary to "balance diversity with the need to foster economic growth in order to provide vigorous competition," however, stressed it was still concerned with promoting diversity. *Id.* para. 10. The economies of scale theory is that group ownership will foster the consolidation of "management, bookkeeping, secretarial, sales and programming personnel for a number of stations and . . . [low] group advertising sales and group program development and purchases Such benefits ultimately rebound to the public by increasing the responsiveness, quality and diversity of programming." *Id.* para. 4.

³⁴ The Commission's initial action was to increase the national ownership limit to 30 AM and 30 FM stations. *In Re Revision of Radio Rules and Policies, Report and Order*, 7 FCC

1991 rulemaking proceeding was the increase in national radio ownership caps to twenty AM and twenty FM stations.³⁵ These restrictions³⁶ were in effect when President Clinton signed The Telecommunication Act of 1996 on February 8, 1996.

B. National Ownership Limits on Television

In the early days of its regulations, the Commission imposed stricter national limits on television station ownership than on radio ownership. In 1941, the FCC limited a person or entity from owning more than three stations nationwide.³⁷ The Commission's stringent standards relaxed in 1944, when it raised the limit to five stations.³⁸

Beginning in 1953, however, the Commission's concerns for diversity and competition were manifested in a more consistent fashion between radio

and television. First, television became part of the FCC's "Rule of Seven," so one entity could own a maximum of seven stations, with no more than five in the VHF band.³⁹ Second, the proposed abandonment of national limits was also made with respect to television ownership caps in 1984.⁴⁰ Similar to the case of radio, however, the complete repeal of television ownership restrictions was rejected in favor of imposing a twelve station limit.⁴¹ The Commission also adopted the ancillary restriction of limiting a group owner's access, via their television stations, to broadcasting too no more than twenty-five percent of the national audience.⁴² Although these were the limits in effect when the 1996 Act was passed,⁴³ the FCC was in the process of considering various proposals to relax the national television ownership limitations.⁴⁴

Rcd. 2755, para. 23 (1992) [hereinafter *1992 Report and Order*]. In response to several petitions for reconsideration, and "in an abundance of caution," however, the Commission reduced the 30 stations-per-service limit just months after its adoption. In *Re Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 7 FCC Rcd. 6387, paras. 10 and 70 (1992) [hereinafter *1992 FNPRM*]. The new national ownership limits were 18 stations per service, ultimately increasing to 20 AM and 20 FM two years after the effective date of the rule (i.e. September 16, 1994). *Id.* para. 70. Additionally, all owners were permitted to obtain a non-controlling interest in three additional AM and FM stations if such stations were minority or small business controlled. *Id.*

³⁵ In *Re Revision of Radio Rules, Second Memorandum Opinion and Order*, 9 FCC Rcd. 7183, para. 5 (1994) [hereinafter *1994 Second Memorandum Opinion and Order*]. Minority owners were permitted to own up to 25 stations in each service. *Id.* Further, non-minority broadcasters could exceed the national limits by up to five, but only if such excess interests were non-controlling interests in minority or small business controlled AM or FM stations. *Id.*

³⁶ 47 C.F.R. § 73.3555(e)(1) (1995), in pertinent part, states that no license for a commercial AM or FM station "shall be granted to any party . . . if the grant . . . would result in such party . . . owning, operating or controlling, or having a cognizable interest in: (i) more than 20 AM, or more than 20 FM stations, provided, however, that minority controlled entities may acquire an additional five stations per service above the national limit and that multiple owners that are not minority controlled may hold an attributable, but not controlling, interest in five additional stations per service above the national limit that are minority controlled or small business controlled."

³⁷ Rules and Regs. Governing Experimental Television Brdcast. Stations, 6 Fed. Reg. 2282, 2284-85 (1941) (codified at former 47 C.F.R. § 4.226).

³⁸ Rules Governing Brdcast. Services Other Than Std. Brdcast., 9 Fed. Reg. 5442 (1944) (codified at former 47 C.F.R. § 4.226).

³⁹ In *Re Amendment of Television Brdcast. Stations Multi-*

ple Ownership Regs., Report and Order, 43 F.C.C. 2797 (1954).

⁴⁰ *1984 Report and Order*, *supra* note 26.

⁴¹ *1985 Memorandum Opinion and Order*, *supra* note 29, para 52. The permissible limit for minorities and persons acquiring cognizable interest in minority owned and controlled stations increased to 14. *Id.* para. 53.

⁴² *Id.* para. 52. National audience reach is determined by dividing the total number of television households in the Arbitron Area of Dominant Influence (ADI) markets where the owner's stations are located by the total national television households according to ADI data. *Id.* note 52. Due to limitations on signal reach, only 50% of UHF station's ADI reach was counted. *Id.* para. 52. Also, single owners may reach up to 30% of the national audience if five percent of that reach is contributed to minority stations. *Id.* para. 53.

⁴³ 47 C.F.R. § 73.3555(e)(1) (1995), in pertinent part, states:

No license for a commercial . . . TV broadcast station shall be granted to any party . . . if the grant . . . would result in such party . . . owning, operating or controlling, or having a cognizable interest in: . . . (ii) more than 14 television stations; or (iii) more than 12 television stations that are not minority-controlled. (2) No license for a commercial TV broadcast station shall be granted . . . to any party . . . if the grant . . . of such license would result in such party . . . owning, operating or controlling, or having a cognizable interest in, either (i) TV stations which have an aggregate national audience reach exceeding thirty (30) percent, or (ii) TV stations which have an aggregate national audience reach exceeding twenty-five (25) percent and which are not minority-controlled.

Id.

⁴⁴ Spawned by a report from the Commission's Office of Plans and Policy (FCC, OPP Working Paper No. 26, Brdcast. TV in a Multichannel Marketplace, (authored by F. Setzer and J. Levy), 6 FCC Rcd. 3996 (1991)), which concluded new competition to broadcast services provided additional choices for consumers and increased competition for broadcast television, the FCC solicited comments on modifying the ownership regulations. *See generally In re Review of the Policy Implications of the Changing Video Marketplace, Notice of In-*

C. Local Ownership Limits on Radio

In addition to concerns regarding nationwide ownership, the FCC regulates duopolies, the common ownership of same service stations within any one particular market.⁴⁵ Regulation of radio duopolies began in the 1940s, when the FCC completely banned such ownership scenarios.⁴⁶ The FCC's early proscription against duopolies is understandable given the Commission's literalist approach to maximizing diversity. In 1970, the FCC explained that fifty-one licensees were more desirable than fifty; and if only fifty different entities control an available sixty frequencies, then sources of ideas are not maximized.⁴⁷

The Commission remained faithful to this position for some time.⁴⁸ Even while the FCC was endorsing the complete elimination of the national ownership caps in the mid-1980s, it reiterated the need for duopoly restrictions, concluding that lo-

cal markets were the appropriate venue for achieving diversity.⁴⁹

The FCC's strict adherence to its duopoly restriction, however, gave way to the same economic considerations causing the Commission to relax national radio caps in the early 1990s. In particular, increased competition from the growing numbers of radio stations and non-radio outlets resulted in economic hardship for the radio industry.⁵⁰ "In view of the increasingly fragmented nature of the local radio marketplace, the economic strain experienced by many . . . radio broadcasters, and the sizable savings that can stem from joint operation of same-market radio facilities," the FCC adopted a new duopoly rule in 1992.⁵¹ The revised regulation limited an owner from reaching more than 25% of the audience and instituted numerical caps of three or four stations, depending on the market size.⁵² Although

quiry, 6 FCC Rcd. 4961 (1991). As a follow up, the FCC issued *In re Review of the Commission's Regs. Governing Television Brdcast.*, *Notice of Proposed Rule Making*, 7 FCC Rcd. 4111 (1992) [hereinafter 1992 NPRM]. No modifications to the rules were made as a result of the 1992 NPRM; however, in 1995, the Commission released a Further NPRM to consider changes occurring since 1992. See generally 1995 FNPRM, *supra* note 4. Specifically, the FCC's concern was that the increased availability of other media, such as cable, DBS, and MMDS, diluted the need to regulate broadcast for the traditional purposes of achieving competition and diversity. *Id.* paras. 12-13. For example, the FCC seeks to promote competition through its ownership caps in order to avoid market abuse. See *supra* text accompanying note 24. The potential for market abuse decreases as alternatives to products increase. 1995 FNPRM, *supra* note 4, para. 20. Accordingly, with burgeoning broadcast substitutes, the FCC's need to promote competition within broadcasting is dissipated. *Id.* Secondly, the FCC seeks to promote diversity of viewpoints through its ownership caps. See *infra* text accompanying note 23. This goal, however, becomes less vital as diversity in non-broadcast media increases. 1995 FNPRM, *supra* note 4, para. 54. Accordingly, the FCC issued its 1995 FNPRM to "further analyze economic and diversity issues with respect to the various proposals" and to revise its ownership rules, which included, for example, increasing the numerical caps and/or the audience reach limitation. *Id.* at para. 14.

⁴⁵ See 1995 FNPRM, *supra* note 4, para. 4.

⁴⁶ Rules Governing Std. and High Frequency Brdcast. Stations, 5 Fed. Reg. 2382 (1940) (codified at former 47 C.F.R. § 3.288) restricted common ownership of FM stations. *Id.* at 2384. The FCC banned AM duopolies in Rules Governing Std. and High Frequency Brdcast. Stations, 8 Fed. Reg. 16,065 (1943). Prior to these two regulations, the FCC just had a policy against granting new licenses which would result in duopolies. *In re Application for Constr. Permit of Radio Gene-see Radio Corp.*, *Initial Decision*, 5 F.C.C. 183 (1938).

⁴⁷ *In re Amendment of Sections 73.35, 73.240 and 73.636 of the Comm'n Rules Relating to Multiple Ownership of Std., FM, and TV Brdcast. Stations*, *First Report and Order*, 22

F.C.C.2d 306, para. 21 (1970) [hereinafter 1970 *First Report and Order*].

⁴⁸ Although the duopoly rules remained in effect for more than 50 years before being significantly revised, the standard for determining duopolies varied. In 1943, the Commission reviewed requests for duopolies on a case by case basis, considering, for example, the extent the stations' service contours overlapped and the potential interference. See 8 Fed. Reg. 16,065 (1943). In 1964, this case by case approach was replaced with a fixed standard. *In re Amendment of Sections 73.35, 73.240, and 73.636 of the Comm'n Rules Relating to Multiple Ownership of Std., FM, and TV Brdcast. Stations*, *Report and Order*, 45 F.C.C. 1476 (1964), *recon. granted in part and denied in part*, 3 Rad. Reg. 2d (P & F) 1554 (1964). A single entity could not own stations in the same service area if the 1 mV/m contours overlapped. *Id.* at para. 1. See also 1991 NPRM, *supra* note 33, para. 17. In 1989, the FCC modified its contour overlap limitations to prohibit one entity from owning two AM stations with overlapping 5 mV/m contours and two FM stations with overlapping 3.16 mV/m contours. *In re Amendment of Section 73.3555 of the Comm'n Rules, the Brdcast. Multiple Ownership Rules*, *First Report and Order*, 4 FCC Rcd. 1723 (1989); See also 1991 NPRM, *supra* note 33, para. 18. Additional Commission rules (47 C.F.R. §§ 73.24(J), 73.315(a)) require that the aforementioned contours encompass the entire principal community. The effect of coupling these two rules was the prohibition on owning two AM or two FM stations in the same principal city. *In Re Revision of Radio Rules and Policies*, *Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 7 FCC Rcd. 6387, n.30 (1992).

⁴⁹ 1985 *Memorandum Opinion and Order*, *supra* note 29, n.22.

⁵⁰ See *supra* note 33 and accompanying text; see also 1991 NPRM, *supra* note 33, paras. 1-3; see 1992 *Report and Order*, *supra* note 34, para. 2.

⁵¹ *Id.* para. 40.

⁵² When the FCC first adopted this tiered approach, it established four different markets with numerical caps of three and four stations in the smaller two categories and five

the FCC received petitions to reconsider its actions, the Commission refused to further amend its rules, claiming that the relaxed restrictions were too new to determine if they would create undue market concentration and/or decreased diversity.⁵³ Accordingly, this two-tiered market approach was in effect when Congress enacted the 1996 Act.

D. Local Ownership Limits on Television

As with the above restrictions, the Commission's regulation of television duopolies began in 1940. The initial restriction prohibited ownership of two television stations broadcasting in substantially the same area.⁵⁴ In 1964, the Commission replaced its "substantially the same area" approach with a more definitive standard. The new rule prohibited common control of two stations if it resulted in overlapping Grade B contours.⁵⁵

This regulation survived almost thirty years before being reconsidered. The FCC initiated a rulemaking proceeding in the early 1990's to consider loosening the restrictions in light of the increased availability of other media.⁵⁶ No changes in the rule resulted, and the prohibition on Grade

B contour overlap was the duopoly rule existing when the 1996 Act was passed.⁵⁷

E. One-To-A-Market Rule

In contrast to the turbulence in the above discussed limitations, the FCC's one-to-a-market rule, proscribing the common ownership of a radio and television station in the same local market,⁵⁸ reflects a more consistent history. In 1970, motivated by the continuous concerns of diversity and competition, the Commission adopted its one-to-a-market rule.⁵⁹ Nearly twenty years later, two events prompted the Commission to revisit this cross-ownership ban. First, the increase in broadcasting outlets lessened the FCC's concern with competition,⁶⁰ and second, the realization that increased supply does not necessarily result in commonality of viewpoints.⁶¹ As a result, the Commission announced it would consider granting waivers to the one-to-a-market restriction under certain conditions.⁶² Waivers were favored if the resultant television-radio combination occurred in one of the top twenty-five television markets and thirty separate broadcast licensees remained after the combination, or if the waiver request

and six stations in the larger markets. *Id.* para. 40. Upon reconsideration, the Commission divided markets into just two areas and reduced the numerical caps, resulting in the following revised 47 C.F.R. § 73.3555(a)(1) (1995):

(a)(1) Radio Contour Overlap Rule. No license for an AM or FM broadcasting station shall be granted to any party (including all parties under common control if the grant of such license will result in overlap of the principal community contour of that station and the principal community contour of any other broadcasting station directly or indirectly owned, operated, or controlled by the same party, except that such license may be granted in connection with a transfer or assignment from an existing party with such interests, or in the following circumstances:

(i) In radio markets with 14 or fewer commercial radio stations, a party may own up to 3 commercial radio stations, no more than 2 of which are in the same service (AM or FM), provided that the owned stations, if other than a single AM and FM station combination, represent less than 50% of the stations in the market.

(ii) In radio markets with 15 or more commercial radio stations, a party may own up to 2 AM and 2 FM commercial stations, provided, however, that evidence that grant of any application will result in a combined audience share exceeding 25% will be considered *prima facie* inconsistent with the public interest.

* * *

(iii) Overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.

⁵³ 1994 Second Memorandum Opinion and Order, see *supra* note 35, para. 39.

⁵⁴ Rules and Regs. Governing Experimental TV Brdcast. Stations, 5 Fed. Reg. at 2384 (1940). See also 1992 NPRM, *supra* note 44, n.27.

⁵⁵ *In re* Amendment of Sections 73.35, 73.240, and 73.636 of the Comm'n's Rules Relating to Multiple Ownership of Std., FM, and TV Brdcast. Stations, *Report and Order*, 45 F.C.C. 1476, paras. 9-12 (1964), *on reconsideration*, 3 Rad. Reg. 2d (P & F) 1554 (1964). The Commission adopted this test at the same time it implemented the fixed contour overlap standards for radio. The FCC noted that television had greater impact and fewer channels than radio, therefore, was being subjected to a more restrictive overlap requirement. *Id.* at 1484.

⁵⁶ See *supra* note 50 and accompanying text.

⁵⁷ 47 C.F.R. § 73.3555(b) (1995).

⁵⁸ 47 C.F.R. § 73.3555(c) (1995).

⁵⁹ 1970 *First Report and Order*, *supra* note 47, n.15. The following year, the FCC lifted the restriction with respect to the formation and transfer of AM/FM combinations. *In re* Amendment of Sections 73.35, 73.240 and 73.636 of the Comm'n Rules Relating to Multiple Ownership of Std., FM and TV Brdcast. Stations, *Memorandum Opinion and Order*, 28 F.C.C.2d 662 (1971).

⁶⁰ *In re* Amendment of Section 73.3555 of the Comm'n Brdcast. Multiple Ownership Rules, *Second Report and Order*, 4 FCC Rcd. 1741, para. 19 (1989), *modified by* *Memorandum Opinion and Order*, 4 FCC Rcd. 6489, para. 26 (1989).

⁶¹ *Id.*

⁶² *Id.*

concerned a failed station.⁶³ If neither of these conditions were present, the Commission would review the waiver request by evaluating and balancing five criteria.⁶⁴

At the time the 1996 Act was passed, the FCC was contemplating liberalizing the one-to-a-market rule.⁶⁵ Before the rule making proceeding was complete, however, Congress passed the 1996 Act. Accordingly, the one-to-a-market rule, with the waiver policy discussed in the preceding paragraph, was effective when the 1996 Act was signed.⁶⁶

II. BROADCAST OWNERSHIP LIMITATIONS AFTER THE 1996 ACT

In an effort to promote competition and deregulate the telecommunication industry, Congress, via the 1996 Act, directed the FCC to severely relax the broadcast ownership restrictions.⁶⁷ The following explains the changes implemented by the new legislation and the Congressional justifications therefore.

A. National Ownership Limits on Radio

The 1996 Act completely erases all limitations on the number of radio stations any one party may own nationally.⁶⁸ The reasoning underlying such a drastic measure is that the objectives of radio ownership regulation have been obtained. Congress appeared satisfied that the existence of 11,000 radio stations nationwide, and an average of twenty-five radio options within each market, evidenced that appropriate levels of competition and diversity were achieved.⁶⁹ The Legislature's

consensus was that in such an environment, "arbitrary limitations on broadcast ownership . . . are no longer necessary."⁷⁰ Apparently, Senator Burns spoke for a collective Congress in declaring that "radio operators are ready to . . . operate without stifling ownership rules. They need total deregulation to allow them to compete in the new digital marketplace."⁷¹

B. National Ownership Limits on Television

The 1996 Act took a similarly drastic approach to relaxing the limitations on nationwide television ownership. As in radio, there is no longer any numerical cap on the quantity of broadcast television stations permitted to be under common ownership.⁷² The Legislature's reasoning for this change echoes that supporting the repeal of national radio caps. A 30% increase in the number of television stations in the last ten years, coupled with competition from cable, low power television ("LPTV"), satellite master antenna television service ("SMATV"), direct broadcast satellite ("DBS"), and video cassette recorders ("VCRs"), caused Congress to eliminate restrictions on the number of stations an entity may own nationwide.⁷³

The expanding video market, however, was not enough to instill Congress with a pure laissez-faire attitude. Congress refused to abandon the restriction on the national audience reach; however, it did increase the limitation from 25% to 35%.⁷⁴ Even in retaining this restriction, however, Congress exhibited some deregulatory intent by not dictating how audience reach should be measured. Accordingly, in November, 1996, the FCC

⁶³ *Id.* A failed station is one which has not been operated for four months or more or is involved in a bankruptcy proceeding. *Id.* para. 86.

⁶⁴ *Id.* The Commission will determine if the proposed combination is in the public interest by reviewing the "types of facilities involved, the potential benefits of the combination, the number of stations already owned by the applicant, the financial difficulties of the station(s), and the nature of the market in light of . . . diversity and competition." *Id.* para. 90.

⁶⁵ 1995 FNPRM, see *supra* note 4, paras. 131-32. The Commission was entertaining two proposals for modifying the one-to-a-market rule. *Id.* at 131. First, the FCC would eliminate the rule entirely if radio and television stations did not compete in the same advertising, program delivery, or diversity markets. *Id.* Instead of the one-to-a-market rule, the local ownership restrictions would function to promote diversity and competition. *Id.* If radio and television did compete

in the aforementioned areas, however, the FCC would allow radio-television combinations in markets where alternative suppliers would ensure competition and diversity. *Id.* at para. 132.

⁶⁶ 47 C.F.R. § 73.3555(c) and note 7.

⁶⁷ The 1996 Act, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C.A. § 151 (West Supp. 1996)).

⁶⁸ *Id.* § 202(a).

⁶⁹ S.R. Rep. No. 104-23 (1995).

⁷⁰ H.R. Rep. No. 104-204 (1995).

⁷¹ S.R. Rep. No. 104-23 (1995).

⁷² The 1996 Act, Pub. L. No. 104-104, § 202(c), 110 Stat. 56 (codified at 47 U.S.C.A. § 151 (West Supp. 1996)).

⁷³ H.R. Rep. 104-204 (1995).

⁷⁴ The 1996 Act, Pub. L. No. 104-104, § 202(c)(1)(B), 110 Stat. 56 (codified at 47 U.S.C.A. § 151 (West Supp. 1996)).

issued a Notice of Proposed Rule Making to solicit comments on how to calculate the revised 35% limitation.⁷⁵ The Commission's objective in seeking comments was to implement the Congressional directive while continuing to promote competition and diversity.⁷⁶

C. Local Ownership Limits on Radio

In addition to the above changes regarding national limitations, Congress modified the restrictions placed on local radio ownership. Although the 1996 Act retains the market tier framework adopted by the FCC in 1992,⁷⁷ it creates four market categories, vice two, and increases the ownership caps depending on each market's size.⁷⁸ The following chart illustrates the new regulation:⁷⁹

Number of Commercial Radio Stations in the Market	Maximum Number of Stations One Party May Own	Maximum Number of Stations in the Same Service (AM or FM)
45 or More	8	5
30 to 44	7	4
15 to 29	6	4
14 or fewer	5*	3

*Limitation: A party may not own more than 50% of the stations in the market.

Congress did allow the Commission some discretion in administering these requirements. The Commission may allow an individual to exceed these thresholds if the result is an increased number of operating radio stations.⁸⁰

The Legislature's intermediate approach of liberalizing the local ownership restraints, but rejecting their complete elimination, is a compromise between two viewpoints. Those opposed to increasing local ownership caps warned such action was "ill-advised . . . until a more thorough analysis of the consequences such deregulation is already having on localism and competition has been completed."⁸¹ Conversely, deregulation advocates assert that ownership

restrictions should be fully eliminated in order to allow radio operators to obtain economies of scale efficiencies.⁸²

D. Local Ownership Limits on Television

In contrast to national ownership caps, and local radio ownership limitations, restraints on local television ownership escaped Congressional control. Instead of mandating a complete abandonment or setting new numerical limits, Congress directed the FCC to conduct a rule making proceeding in order to determine the fate of local television ownership rules.⁸³ The Congressional intent behind this directive is that the "FCC should revise the rule as is necessary to ensure that broadcasters are able to compete fairly with other media providers while ensuring that the public receives information from a diversity of media voices."⁸⁴

The FCC obeyed orders and is seeking comments on the revision of its television duopoly rule.⁸⁵ In particular, the FCC is considering replacing the current restriction on Grade B contour overlap with a ban on DMA/Grade A contour overlap.⁸⁶ Further, the Commission seeks comments on possible exceptions to the television duopoly rule.⁸⁷

E. One-To-A-Market Rule

The pervasive 1996 Act did not forget the one-to-a-market restriction. Congress directed the FCC to extend its liberal waiver policy, previously encompassing the top twenty-five markets, to the top fifty markets.⁸⁸ In response to this legislative instruction, and the 1996 changes to the local radio ownership rules, the FCC is seeking comment on several proposals to change or eliminate its

⁷⁵ *In re Brdcast. TV National Ownership Rules, Notice of Proposed Rule Making* in MM Dkt. No. 96-222, FCC 96-437 (Nov. 7, 1996). The three issues on which the FCC sought comment were: (1) whether to include the ownership of satellite stations in measuring ownership; (2) whether to count LMAs in determining audience reach; and (3) whether to retain or replace the use of Arbitron's Areas of Dominant Influence ("ADIs") in defining markets. *Id.* at para. 1.

⁷⁶ *In re Brdcast. TV National Ownership Rules, Notice of Proposed Rule Making* in MM Dkt. No. 96-221, FCC 96-438 (Nov. 7, 1996).

⁷⁷ See *supra* notes 51-52 and accompanying text.

⁷⁸ The 1996 Act, Pub. L. No. 104-104, § 202(b)(1), 110

Stat. 56.(codified at 47 C.F.R. § 73.3555(A)(1) (1996)).

⁷⁹ *Id.*

⁸⁰ *Id.* § 202(b)(2).

⁸¹ H.R. Rep. No. 104-204 (1995).

⁸² 141 CONG. REC. S 8424 (1995).

⁸³ The 1996 Act, Pub. L. No. 104-104, § 202(c)(2), 110 Stat. 56 (codified at 47 U.S.C.A. § 151 (West Supp. 1996)).

⁸⁴ 142 CONG. REC. H 1145 (1996).

⁸⁵ 1996 Second FNPRM, see *supra* note 7.

⁸⁶ *Id.* para. 92.

⁸⁷ *Id.* paras. 29-55.

⁸⁸ The 1996 Act, Pub. L. No. 104-104, § 202, 110 Stat. 56 (codified at 47 U.S.C.A. § 151 (West Supp. 1996)).

one-to-a-market rule.⁸⁹

III. CONGRESSIONAL MYOPIA

In completely "renovating" the broadcast ownership regulations in the 1996 Act, Congress made the following "mistakes of short sighted man."⁹⁰

A. Congress Blinded by Deregulatory Zeal

First, the Legislature allowed its obsessions to displace its logic. Specifically, Congress' fixation with deregulating the telecommunication industry was inappropriately applied to broadcasting.

The fact that the 1996 Act is over-inclusive is blatantly apparent upon reading the first sentence of the legislation. The proffered purpose of the 1996 Act is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."⁹¹ This statement of purpose, while motivated by good intentions, is inapplicable to broadcasting. Although the reduction of ownership restrictions is clearly deregulatory, and economic theory supports that increased competition results in decreased prices,⁹² the operative prepositional phrase is "in order to."

The first intended effect is lower prices for consumers.⁹³ It is difficult to envision how prices can get any lower in the broadcast medium, as radio and television are already free.⁹⁴ In return for

free broadcasting, consumers are said to pay indirect costs such as purchasing products advertised over the airwaves and allocating time to the medium.⁹⁵ The deregulation of ownership limits, however, will not result in any savings to these indirect costs of the consumer. Such costs exist independent of who owns, operates, or controls the source of the broadcast. In fact, the 1996 Act, in application, is functioning to increase the indirect cost of advertising. The decrease in ownership restriction has generated an increase in monopolies.⁹⁶ Mergers allow broadcasters to dominate markets and thereby gain bargaining power over advertisers. The powerful broadcasters can "force advertisers to buy "tie-ins" where they are only allowed to buy on top-ranked stations if they make buys on lower-ranked stations at the same time."⁹⁷ Any increase in cost born by the advertiser will be reflected in the price of goods and services and is, therefore, passed on to the consumer.

The second goal advanced in the statement of purpose is to provide consumers with higher quality services.⁹⁸ In the broadcasting arena, the presumed equation under which the FCC operates is competition + diversity = quality.⁹⁹ Accordingly, the two addends are directly proportional to the sum, quality. Unfortunately, the relaxation of ownership limits is resulting in less competition and, consequently, less diversity in the broadcasting marketplace.¹⁰⁰

Given that the 1996 Act's express purpose does not reflect achievable goals in the broadcast arena, one may think it useful to investigate the legislative history to obtain a deeper understand-

⁸⁹ 1996 Second FNPRM, *supra* note 7, paras. 62-79.

⁹⁰ See *supra* note 1 and accompanying text.

⁹¹ The 1996 Act, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C.A. § 151 (West Supp. 1996)).

⁹² See generally PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 56-61, (1989).

⁹³ See *supra* note 91 and accompanying text.

⁹⁴ 1995 FNPRM, *supra* note 4, paras. 68, 115; "[B]roadcast television . . . can be received free of charge through the air with a standard television set and antenna." *Ameritech Corp. v. U.S.*, 867 F. Supp. 721 (1994). The same prerequisites allow consumers to enjoy broadcast radio free of charge. The 1992 Cable Act's "must-carry" provisions, requiring cable operators to carry local television stations, were enacted to preserve access to free television programming for the 40% of Americans without cable. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

⁹⁵ "Viewers may be said to pay for over-the-air television through their purchase of advertised products, a portion of the price of which reflects the cost of advertising - including television advertising. Also, the consumer must first

purchase a television set in order to receive over-the-air programming and allocate viewing time, at least part of which is likely spent viewing commercials. Thus, viewers pay several indirect costs in return for 'free' television. However, they are not the sort of direct payment that must be made for subscription services." 1995 FNPRM, *supra* note 4, n.91. These indirect costs are similarly applicable to radio.

⁹⁶ See *infra* notes 111-126 and accompanying text.

⁹⁷ *Justice Begins Radio Probe*, No. 5, Vol. 4, MEDIA Daily (Aug. 2, 1996). One source claims the motivation for Westinghouse to recently buy out Infinity (see *infra* notes 115-16 and accompanying text), was to control radio pricing in its markets. *Id.*

⁹⁸ See *supra* note 91 and accompanying text.

⁹⁹ See *supra* notes 5, 6, and 18 and accompanying text. The FCC's commitment to the ideals of competition and diversity suggests that a broadcast system which achieved such goals would be a quality system.

¹⁰⁰ See *infra* notes 111-126 and accompanying text and notes 139-152 and accompanying text.

ing of Congress' motivation for addressing broadcasting ownership in the legislation. Unfortunately, delving into this history only underscores the inappropriateness of applying the 1996 Act's objectives to broadcasting.

The drafters of the 1996 Act continuously stated that the new legislation was needed to replace the outdated Communications Act of 1934.¹⁰¹ For example, one commentator's justification for the legislation was that "America continues to operate under an antiquated regulatory regime. Our current regulatory scheme in America simply does not take many dramatic technological changes into account."¹⁰² Similarly, one reformer phrased his mission as reforming an "outmoded and antiquated, regulatory apartheid system in order to make exciting new information, telecommunications and entertainment services available for America."¹⁰³

Again, these statements are facially void of any need to relax ownership restrictions. They show overwhelming interest in new technologies, not broadcasting. Granted, new technologies affect broadcasting in that they create a more competitive environment by presenting alternatives to the media consumer. In fact, this is the oft cited rationale of the FCC in explaining its historic increases of ownership ceilings.¹⁰⁴ It is a presumptive leap of logic, however, to conclude that increased competition warrants complete abandonment of national ownership caps which have existed for over half a century. Even the highly deregulatory FCC of the 1980's, recognizing "that the communications marketplace [was] undergoing rapid change," realized that "[p]rudence and caution . . . [required] a transition that provide[d] for monitoring and special scrutiny of sharp departures from the current status of the broadcast industry."¹⁰⁵ The recent legislation is a prime example of Congress throwing caution to the wind.

B. Deregulation of Ownership Restrictions Destroys Broadcasting Ideals

The effect of including broadcasting in the over-sized umbrella of the 1996 Act, is that the concept of "the public interest"¹⁰⁶ is drowning. Although competition cannot achieve the legislation's stated ends of lower prices and increased quality,¹⁰⁷ Congress may have believed competition would serve other goals. The 1996 Act, however, is not increasing competition. Instead, Congress, in an attempt to promote competition, has triggered a destructive chain of events which has resulted in an increased concentration of ownership.¹⁰⁸ The centralized ownership of broadcast stations threatens the public interest by detrimentally affecting localism and diversity.¹⁰⁹ Accordingly, by enacting the 1996 Act, Congress legislated in the private interest and placed a heavy burden of the FCC's ability to regulate in the public interest.¹¹⁰

1. *Merger Mania = Decreased Competition*

Since the inception of ownership limitations, "competition" is the word that's been offered to justify their existence.¹¹¹ Accordingly, the theory is that competition is achieved by placing ceilings on ownership, thus providing increased opportunities for multiple players to enter the broadcast marketplace. Logic dictates that if this theory is effective, the inverse would also be true – fewer participants will enter the broadcasting arena when ownership restrictions are increased or eliminated, thus competition will not be achieved. This hypothesis is proven upon an examination of the events since the deregulatory legislation.

During the first month of the 1996 Act's existence, over \$2 billion in radio station transactions took place;¹¹² in comparison the same sum was spent on such deals during an entire year in the

¹⁰¹ 142 CONG. REC. S 2207 (1996). Mr. Pressler, reading from his article, "Telecom Reform: It Ain't Over 'Til It's Over," "Congress had been so long about the business of updating the nation's antiquated communications laws . . ." 142 CONG. REC. S 686 (1996); "The purpose of this bill is to update the 1934 Communications Act. This is the first complete rewrite of the telecommunications law in our country. It is very much needed." 141 CONG. REC. S 15144 (1995); "We are in a situation today that our Nation very much needs to modernize its telecommunications laws." 141 CONG. REC. S 7881 (1995); "The telecommunications industry . . . is regulated under a set of laws that are antiquated and never designed to

handle the challenges of today's industry."

¹⁰² 141 CONG. REC. S 7881, S 7886 (1995).

¹⁰³ *Id.* at 7886.

¹⁰⁴ See *supra* notes 33 and 50 and accompanying text.

¹⁰⁵ 1984 Report and Order, *supra* note 26, para. 109.

¹⁰⁶ See *supra* note 11.

¹⁰⁷ See *supra* notes 93-100 and accompanying text.

¹⁰⁸ See *infra* notes 111-126 and accompanying text.

¹⁰⁹ See *infra* notes 124-148 and accompanying text.

¹¹⁰ See *supra* note 11.

¹¹¹ See *supra* notes 18 and 22 and accompanying text.

¹¹² Peter K. Pitsch, *An "Innovation Age" Perspective on Tele-*

1980's.¹¹³

This first month was indicative of the events to follow. Most significantly, Infinity, the second largest radio group, merged with the even larger Westinghouse/CBS, the latter paying \$4.9 billion for the buyout.¹¹⁴ As a result of the largest acquisition in radio history, Westinghouse/CBS now owns fifty FM stations and thirty-three AM stations throughout sixteen markets, and has sixty-nine of its eighty-three outlets in the largest ten markets.¹¹⁵ Clear Channel Communications, however, after purchasing Heftel Broadcasting, has an even more pervasive presence owning 108 radio stations.¹¹⁶

While these high-dollar transactions are placing their initiators on the leading edge in large markets, they are also fueling the strategies behind other mergers. Benchmark Communications, for example, is buying stations in smaller markets where it can avoid wrestling with the oversized Westinghouse/CBS.¹¹⁷ The company is interested in maximizing its control not by number of stations owned, but in terms of controlling a large percentage of the markets in which it operates.¹¹⁸

The radio station buying spree is even trickling down to the state and city level. Paxson Commu-

nications recently increased its station ownership from fifteen to thirty-nine outlets, all within Florida.¹¹⁹ Similarly, as a result of relaxed ownership restrictions, Evergreen Media Corporation now owns six FM stations in the Chicago market.¹²⁰

The above examples are far from an exhaustive list of the transactions occurring since the passage of the 1996 legislation. This fact is exemplified by the statistic that before the Act's nine-month anniversary, 1,175 stations were traded,¹²¹ and the merger-mania trend is not subsiding.¹²²

Although numerical restrictions on national television ownership were also eliminated by the 1996 Act, the buying frenzy in this medium has not reached the same heights as in radio.¹²³ Nonetheless, there is still a wealth of activity resulting in a more concentrated ownership of television. Paxson Communication now owns 48 television stations;¹²⁴ Sinclair Broadcast Group, after purchasing River City Broadcasting, operates twenty-eight stations;¹²⁵ and numerous other mergers have resulted in similar scenarios.¹²⁶ The decrease in competition, evidenced by this categorical data, is generating a decline in localism and diversity.

communications Mergers (last visited April 27, 1997) <<http://www.cse.org/cse/pitch.html>>.

¹¹³ *Id.*

¹¹⁴ Chuck Taylor, *Telecommunications Act Defined Year In Radio Station Sales And Mergers*, WKTU, *Internet Top '96 News*, BILLBOARD, Dec. 28, 1996.

¹¹⁵ Chuck Taylor, *Westinghouse, Infinity Merger Fuels Consolidation Concerns*, BILLBOARD, Jul. 6, 1996.

¹¹⁶ *Id.*

¹¹⁷ Timothy J. Mullaney, *On-the-air Niche; Radio: Two Entrepreneurs Turned Their Backs on Cable TV to go on a Timely Buying Spree in Radioland*, BALTIMORE SUN, Sept. 23, 1996, at 13C.

¹¹⁸ *Id.*

¹¹⁹ *Paxson Cranks up the Radio: West Palm Company's Acquisition Blitz Continues*, BROWARD DAILY BUS. REV., Dec. 20, 1996, at A16.

¹²⁰ *Evergreen Media Acquires WPNT Chicago; Provides Evergreen With Fifth Full Power FM Signal in Chicago*, BUSINESS WIRE, July 18, 1996, at 1.

¹²¹ Chuck Taylor, *Telecommunications Act Defined Year In Radio Station Sales And Mergers*, WKTU, *Internet Top '96 News*, BILLBOARD, Dec. 28, 1996. The plethora of activity is described by the following statements on the merger mania: "One glance through [Billboard Magazine's] pages in any given week in 1996, and you're bound to have seen the words "buy," "sell" or "swap."'" *Id.*; "The starting gun went off for the latest wave of television mergers with the passage of the Telecommunications Act of 1996." Mark Gimein, *Groups Look to Cut Costs, Set the Pace*, MEDIAWEEK, Sept. 9, 1996, Vol. 6, No. 37, at MQ28; "With the signing of the Telecommunications Act of 1996, a flurry of acquisitions in the radio industry

has taken place." Peter Heerwagen, *Changing tunes of the radio industry*, QUAD-STATE BUS. J., Sept. 1996, Vol 7; No 11, at 17.

¹²² In February, 1997, Evergreen Media, Chancellor Broadcasting, and Viacom announced their plans to form Chancellor Media Corp., which would own 103 stations in 21 markets. "The transaction is the latest in a series of buyouts that is transforming the radio industry . . . all over the country." Paul Farhi, *Radio Deal to Pool 11 Area Stations*, WASH. POST, Feb. 19, 1997, at D10.

¹²³ Elizabeth A. Rathbun, *Networks Take Station-Buying Breather; Television Station Acquisitions*, BROADCASTING & CABLE, Apr. 8, 1996, at 41. (explaining that the television industry is "taking a breather from recent year-end activity" to restructure and prepare for the buying surge which will follow the lull).

¹²⁴ *Paxson Cranks up the Radio: West Palm Company's Acquisition Blitz Continues*, BROWARD DAILY BUS. REV., Dec. 20, 1996, at A16.

¹²⁵ Digby Lerner, *In Today's Multimedia Game, Spotlight Is on Management; Riding the High-Tech Roller Coaster-Without Losing Your Balance*, INT'L HERALD TRIB., Aug. 10, 1996, Money Report.

¹²⁶ A sampling of transactions during 1996: Gannett bought Multimedia Entertainment and now operates 15 TV stations; A. H. Belo Corp. purchased Providence Journal Co., giving them 16 television stations; Tribune Company bought Renaissance Communications and now has 16 television stations, accessing one-third of America's TV households. *Merger Mania in the Telecommunications Industry*, CEP Report, Jan. 26, 1997.

2. *Localism in Danger*

The principle of localism has guided the FCC and the judiciary in promulgating regulations and rendering decisions respectively.¹²⁷ It apparently did not, however, guide Congress in its decision to dramatically loosen ownership restraints.

The consolidation of ownership resulting from the 1996 Act necessarily increases the number of absentee owners of broadcast stations. This end effect does not in itself threaten localism; therefore, it is important to consider the effect it does have. What motivates parties to be absentee owners? Money. "The reigning mentality [of group owners is] . . . cut costs, squeeze money from the new properties and fight for every last dollar."¹²⁸ Successful localism demands comprehensive newscasts and plentiful public affairs programming.¹²⁹ The group broadcast owners cannot concurrently pump money into local programming and "squeeze money" from their new stations concurrently. The results of this penny pinching will be to justify the fears that "formats will serve the most profitable demographics only and that syndicated programming will become a cost-saving mainstay, prompting a decline in localization."¹³⁰

Since the absentee owner is motivated by money, he is disinterested in the burdened of non-transferable debt.¹³¹ Accordingly, the "new barons of radio . . . convert their stations from local presences into cash cows for instant milking, their values ballooned for trading to the next buyer."¹³² Concluding that this process results in decreased localism is difficult to challenge when group owners themselves admit, "It's commodity

trading to us. We don't know [our] community. We're short-term players."¹³³

Congress has accelerated the demise of localism by increasing the permissible audience reach of television station owners to 35%. The relaxed ceiling is an invitation for national television networks to increase their ownership of local stations.¹³⁴ Localism is certainly not achieved by transforming local broadcast stations into "passive conduits for network transmissions from New York."¹³⁵

Congress also constructed a hurdle to the preservation of localism over the radio spectrum. Due to the new liberal duopoly rules, radio purchasers justify the astronomical price tags of group ownership by reasoning they will decrease costs by consolidating resources and eliminating redundant employees.¹³⁶ Unfortunately for localism, the news and public affairs departments are often the first areas of downsizing. In many instances, the once averred local radio newscast has been abandoned in favor of one individual reading "news and weather supplied to all clients by a single news source, the Associated Press."¹³⁷ There is hardly anything more juxtaposed to localism than mass produced news.

The decrease in localism is occurring at a time when it is the most needed. Congress reasons that the increased availability of other media warrants decreased ownership caps in broadcasting. The competing video media (e.g. multipoint distribution service, satellite master antenna television systems, direct broadcast satellites), however, are national providers not purveyors of local programming.¹³⁸

¹²⁷ Benjamin M. Compaine, *The Impact of Ownership on Content: Does it Matter?* 13 CARDOZO ARTS & ENT L.J. 755, 761 (1995).

¹²⁸ Mark Gimein, *Groups Look to Cut Costs, Set the Pace*, MEDIAWEEK, Sept. 9, 1996, at MQ28.

¹²⁹ Prior to enacting the 1996 Act, Representative Hollings cautioned that "[a]ny modification in the national ownership cap is important because of localism concerns. Local television stations provide vitally important services in our communities. Because local programming informs our citizens about natural disasters, brings news of local events, and provides other community-building benefits, we cannot afford to undermine this valuable local resource." 141 CONG. REC. S 7896 (June 7, 1995). "Localism permits broadcasters to tailor their programming to the needs and interests of their communities." 104 H. R. 204 (July 24, 1995).

¹³⁰ Chuck Taylor, *Westinghouse, Infinity Merger Fuels Consolidation Concerns*, BILLBOARD, July 6, 1996.

¹³¹ 142 CONG. REC. S 6108 (June 11, 1996).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 104 H. R. 204 (July 24, 1995) (saying "Deregulation of the audience cap will intensify concentration in the hands of the vertically-integrated, national television networks.")

¹³⁵ 104 H. R. 204 (July 24, 1995)

¹³⁶ Peter Heerwagen, *Changing Tunes of the Radio Industry*, QUAD-STATE BUS. J., Sept., 1996, at 17.

¹³⁷ 142 CONG. REC. S 6108 (June 11, 1996). "The name of the game is to avoid being the 'last sucker' stuck with debt if recession hits."

¹³⁸ 1995 FNPRM, *supra* note 4, para. 67. "[T]hese systems carry primarily entertainment programming, [however], [s]ome will offer national and international news but, with the exception of [Direct Broadcast Satellite], none have public interest obligations." *Id.*

3. Diversity Threatened

Diversity is equally important as localism in broadcasting. The actual definition of diversity, however, has changed over time. In earlier days, the Commission's objective appeared to be solely a diversity of sources.

In adopting the "Rule of Seven," the FCC stated its goal was a diversity of sources.¹³⁹ In 1965, the Commission explained comparative hearings existed to achieve diversification of control.¹⁴⁰ Words such as "sources" and "control" lead some to believe the objective is simply diversity of ownership. For example, one writer explains the objective as an "effort to diversify the sources of information coming to the electorate; it is not aimed at diversifying programming or viewpoints."¹⁴¹ Followers of this view would argue that the Commission sought program diversity through regulations such as the Prime Time Access Rule¹⁴² and the Fairness Doctrine.¹⁴³ Because these two doctrines no longer exist,¹⁴⁴ diversity may encompass more than varied ownership. In fact, the FCC's own language supports this interpretation. The Commission's justification for the one-to-a-market rule is the promotion of program diversity.¹⁴⁵ A fair compromise between the two definitions is that the FCC seeks a broad ownership base to maximize opportunities for diverse viewpoints. The fact that the 1996 Act did not provide a foundation for widespread ownership is already established, therefore, the Act's potential effects on diverse viewpoints must be examined.

The FCC has advanced the ideal of diversity as a justification for restraints on competition for over

fifty-five years.¹⁴⁶ Further, this theory received judicial endorsement on numerous occasions.¹⁴⁷ However, the legislature either does not buy into this long standing principle, presumes the existence of alternative media sources satisfies the diversity goal, or believes both alternatives.

The legislative history supports that, at a minimum, Congress' actions were motivated by the proliferation of media outlets.¹⁴⁸ Admittedly, the plethora of mediums available in today's telecommunication industry provides a marketplace of ideas on a global scale. This does not, however, serve as a substitute for the need of broadcasting to be diverse in and of itself. Although cable television is, in many aspects, a substitute for broadcast television,¹⁴⁹ cable's distinguishing features preclude it from being fairly considered in the diversity analysis. Unlike broadcast television, cable requires consumers pay a subscription fee and engenders limited public interest obligations.¹⁵⁰ In addition to these inherent differences between broadcast and television, broadcasting is a much more available medium. Only two-thirds of individuals who have access to cable actually subscribe.¹⁵¹ This statistic magnifies the inappropriateness of Congress in relying on newer technologies, such as DBS and MMDS. If cable, "a mature technology that is well-established and well-entrenched in the media marketplace,"¹⁵² is only desired by 66% (i.e. two-thirds) of those with access, then the less established and pervasive mediums of DBS and MMDS, are surely not serving as broadcast substitutes to the consumer. In short, Congress' macro approach to diversity in-

¹³⁹ In re Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regs. relating to Multiple Ownership of AM, FM and TV Brdcat. Stations, *Report and Order*, 9 Rad. Reg. (P & F) 1563, para. 10 (1953).

¹⁴⁰ Policy Statement on Comparative Brdcat. Hearings, *Public Notice*, 1 F.C.C.2d 393, 394 (1965).

¹⁴¹ Henry Geller, *Ownership Regulatory Policies in the U.S. Telecomsector*, 13 CARDOZO ARTS AND ENT. L.J. 727, 730 (1995).

¹⁴² 47 C.F.R. § 73.658(k) (1993) (The Prime-Time Access Rule allowed networks to only program 3 hours during prime time).

¹⁴³ *Red Lion Broad. Co., v. FCC*, 395 U.S. 367 (1969). The Court upheld the constitutionality of the Fairness Doctrine (which required broadcasters to provide adequate and fair coverage of public issues) because the scarce spectrum justified this public interest regulation.

¹⁴⁴ The FCC repealed the Fairness Doctrine as it found the abundance of media outlets rendered the scarcity rationale obsolete. The Commission determined the doctrine was no longer necessary to ensure public access to the marketplace of ideas. *In re Complaint of Syracuse Peace Council*

against Television Station WTVH Syracuse, New York, *Memo- randum Opinion and Order*, 2 FCC Rcd. 5043 n.88 (1987). In 1995, the FCC repealed the Prime Time Access Rule, determining it was no longer in the public interest given the existence of cable, satellite systems, and VCRs. *In re Review of the Prime Time Access Rule*, *Report and Order*, 11 FCC Rcd. 546 (1995).

¹⁴⁵ 1996 *Second FNPRM*, *supra* note 7, para. 59.

¹⁴⁶ See *supra* note 23 and accompanying text.

¹⁴⁷ *U.S. v. Storer Broad.*, 351 U.S. 192 (1956); *NBC v. U.S.*, 319 U.S. 190 (1943); *FCC v. Nat'l Citizens for Broad.*, 436 U.S. 775 (1978).

¹⁴⁸ See *infra* note 193.

¹⁴⁹ 1995 *FNPRM*, *supra* note 4, para. 66.

¹⁵⁰ *Id.* (saying "An over-the-air broadcast television station is required to provide programming responsive to issues facing its local community, afford equal opportunities to political candidates, and to provide reasonable access to candidates for federal elective office.")

¹⁵¹ *Id.*

¹⁵² *Id.* para. 70.

vites devastating consequences for the micro-media focused consumer.

IV. CONGRESS VIOLATED EQUAL PROTECTION

The Constitution's Equal Protection clause forbids the government to "deny to any person within its jurisdiction the equal protection of the laws."¹⁵³ The clause "is essentially a direction that all persons similarly situated should be treated alike."¹⁵⁴ The following discussion demonstrates that radio and television are indeed similarly situated. Accordingly, Congress violated the equal protection guarantee of the Fifth Amendment¹⁵⁵ by allowing a single television station owner greater audience reach than a single radio station owner.

A. The Disparate Treatment of Radio and Television

The 1996 Act eliminated all national numerical ownership caps on radio and television; however, it restricts one television owner from reaching more than 35% of the national audience.¹⁵⁶ Conversely, a single radio station owner is not limited by any such national audience cap. Although the limitations on radio ownership within each specific market function to limit one owner's national numerical ownership,¹⁵⁷ this is a separate and distinct issue from national audience penetration. Accordingly, the current ownership regulations limit the speaker, who seeks to convey his message through an audio-visual medium, to reach 35% of the population, and allow purveyors of purely aural messages to be heard by all.

A simple example illustrates the unequal treatment. The smallest market category set forth in the rules on local radio ownership is a market

with "14 or fewer commercial radio stations."¹⁵⁸ In this scenario, a party may own "up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own . . . more than fifty percent of the stations in such market."¹⁵⁹ In a two-radio station market, a party could own one station, due to the 50% restriction. In a one-radio station market, the 50% rule would have no effect, therefore, anyone could own that station. There is no concern with exceeding national ownership limits or audience reach restrictions, as these types of restraints are not placed on radio.¹⁶⁰ As a result, creating the most restrictive scenario, a single party may own at least one station in every market. It follows that such an individual's message is available to all of America. Alternatively, the purchaser who invests his assets in television, can only speak to 35% of the nation.¹⁶¹ This example evidences the Congressional favoritism of audio messages over audio-visual communication.

Viewing the above scenario from an alternative perspective of diversity, it is possible that the end result of deregulating ownership restrictions would have been to favor the speech of television, instead of radio, broadcasters. Congress invited the FCC to eliminate all restraints on the number of television stations a party could own locally.¹⁶² If Congress' myopia was contagious, and the FCC accepted the invitation, three people could determine what is communicated via broadcast television because the only restriction remaining would be the 35% audience reach limitation. The duopoly restrictions on radio,¹⁶³ however, preclude such a scenario.

Unlike the Legislature, however, the Commission continues to endorse the position that controlling local ownership is a prerequisite for diversity. Instead of abandoning the television duopoly rules in response to the 1996 Act, the FCC is pro-

¹⁵³ U.S. Const. amend. XIV.

¹⁵⁴ *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 287 n.12 (1990).

¹⁵⁵ Equal protection analysis is the same under both the Fourteenth and Fifth Amendment; therefore, this article includes cites to state equal protection cases in discussing federal violations of equal protection. *See Weinberg v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). *See also Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

¹⁵⁶ The 1996 Act, Pub. L. No. 104-104, §§ 202(a),

202(c)(1)(A) and (B), 110 Stat. 56 (codified at 47 U.S.C.A. § 151 (West Supp. 1996)).

¹⁵⁷ *See supra* notes 77-78 and accompanying text.

¹⁵⁸ The 1996 Act, Pub. L. No. 104-104, § 202(b)(1)(D) 110 Stat. 56 (codified at 47 C.F.R. § 73.3555(a)(1) (1996)).

¹⁵⁹ *Id.*

¹⁶⁰ *See supra* note 68 and accompanying text.

¹⁶¹ The 1996 Act, Pub. L. No. 104-104, § 202(c)(1)(B), 110 Stat. 56 (codified at 47 U.S.C.A. § 151 (West Supp. 1996)).

¹⁶² *Id.* § 202(c)(2).

¹⁶³ *Id.* § 202(b).

posing to modestly relax the restrictions.¹⁶⁴ The FCC is also proactively attempting to reconcile its own past disparate treatment of the two broadcast mediums. The Commission is currently considering extending its policy of attributing radio local marketing agreements ("LMAs") (in calculating ownership totals) to television LMAs.¹⁶⁵ If this regulation is implemented, television owners will no longer be able to circumvent ownership caps through the LMA loophole.

B. The Analytical Framework

1. *The Equal Protection Standard*

The initial task for any tribunal determining whether a law withstands equal protection attack, is deciding which level of scrutiny to apply.¹⁶⁶ Regardless of the scrutiny level applied, however, the critical question in an equal protection challenge is always "whether there is an appropriate governmental interest suitably furthered by the differential treatment" at issue.¹⁶⁷ There are two variables in this principal question: (1) what is an "appropriate" governmental interest and (2) what are the "suitable" means for its achievement. When the classification is not the result of invidious discrimination¹⁶⁸ and the subject of the regulation is not a fundamental right,¹⁶⁹ then "appropriate"

becomes "legitimate" and the classification is "suitable" if it rationally furthers the legitimate governmental interest.¹⁷⁰ This is known as the rational basis test and is the "least rigorous degree of scrutiny."¹⁷¹ When invidious discrimination or fundamental rights are involved, however, the scrutiny level increases and "legitimate" becomes "compelling" and "rationally furthers" becomes "necessary."¹⁷² The result of all this word swapping is the strict scrutiny test. There is also an intermediate level of scrutiny, which falls in between the rational basis and strict scrutiny tests.¹⁷³

Perhaps the only thing more daunting than mastering the above maze of constitutional standards, is determining which level of scrutiny to apply when analyzing whether distinguishing between radio and television in ownership caps is violative of equal protection. The first step in determining if strict scrutiny is warranted, is deciding if the ownership restrictions implicate the fundamental right to free speech. This requires a foray into First Amendment jurisprudence.

a. *Protection Under the First Amendment*

The First Amendment prohibits Congress from making any law which abridges "the freedom of

¹⁶⁴ 1996 *Second FNPRM*, see *supra* note 7. The FCC proposes to modify the current Grade B standard to a rule prohibiting Grade A station overlap, utilizing Designated Market Areas (DMA's consist of counties "grouped together on the basis of actual household viewing patterns" and are established by the A.C. Nielsen Company), and granting waivers under certain conditions. *Id.* n.12 and para. 4. The Grade A contour is less restrictive because "Grade B contour encompasses approximately a 50-70 mile radius around the television station's transmitter while the Grade A encompasses approximately a 30-45 mile radius." *Id.* n.23. Relying on DMA vice Grade B contours is thought to be more indicative of a station's true geographic market. *Id.* para. 14. The Commission is considering granting waivers to its local television ownership restrictions in order to favor UHF over VHF and to exempt satellite stations from the rules. The FCC is also seeking comment on case by case waiver criteria. *Id.* para. 30.

¹⁶⁵ *Id.*

¹⁶⁶ *Rimmer v. Colt Indus. Operating Corp.*, 495 F.Supp. 1217, 1226 (W.D. MO 1980). "The first problem for this Court on this challenge is to determine the level of scrutiny to which the . . . [s]tatute should be subjected"; See Marianne M. Jennings, *A Primer for the Constitutionally Impaired*, 32 DUQ. L. REV. 743 (1994) (Summarizing the three levels of scrutiny used in equal protection jurisprudence as rational basis, intermediate scrutiny, and strict scrutiny). The test applied depends on the subject of the regulation.

¹⁶⁷ *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Community-Serv. Broad. of Mid-Am., Inc. v. FCC*, 593 F.2d 1102, 1122 (D.C.Cir. 1978); *Rimmer*, 495 F. Supp. at 1217.

¹⁶⁸ Invidious means arbitrary, irrational, and not reasonably related to a legitimate purpose. *Eaton v. State*, 363 A.2d 440, n.2 (1976).

¹⁶⁹ Fundamental rights are those rights explicitly or implicitly guaranteed by the Constitution. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

¹⁷⁰ *Mosley*, 408 U.S. at 95; *Community-Serv. Broad.*, 593 F.2d at 1122; *Rimmer*, 495 F. Supp. at 1217.

¹⁷¹ *Ameritech Corp. v. United States*, 867 F.Supp. 721, 729 (N.D.Ill. 1994).

¹⁷² *Id.*

¹⁷³ The intermediate, or heightened, level of scrutiny requires the government's differential treatment of individuals or entities to be "reasonably related" (instead of "rational" or "necessary") to furthering an "important" (vice "legitimate" or "compelling") government interest. *Frontiero v. Richardson*, 411 U.S. 677 (1973). This intermediate standard is applied when the class is quasi-suspect (See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971), subjecting gender based classifications to an intermediate standard) or the right is quasi-fundamental (See, e.g., *Plyer v. Doe*, 457 U.S. 202 (1982), declaring education to be more than a mere government benefit, and applying heightened scrutiny in striking down a Texas law denying illegal alien children a free public education).

speech, or of the press . . ."¹⁷⁴ Because broadcasters "engage in and transmit speech," they are protected under the "speech" and "press" provisions of the Amendment.¹⁷⁵ When this protected speech is encumbered, the courts apply one of three levels of scrutiny in concluding whether the burden on speech is justified. These three tests generally mirror the three scrutiny levels applied in equal protection analysis.

The First Amendment's rational basis test upholds regulations that are a "reasonable means" of promoting a "permissible" government interest.¹⁷⁶ This test has traditionally been reserved for regulations burdening broadcasters' freedom of expression.¹⁷⁷ The rationale for applying the lowest constitutional threshold to broadcast regulations is the scarcity of broadcast spectrum.¹⁷⁸ In upholding the FCC's ban on intra-market common ownership of a newspaper and broadcast station, the Supreme Court reasoned the broadcast medium possessed unique attributes.¹⁷⁹ "In view of the limited broadcast spectrum, allocation and regulation of frequencies are essential. Nothing in the First Amendment prevents such allocation as will promote the 'public interest' in diversification of the mass communications media."¹⁸⁰

Deserving of a higher level of protection are governmental regulations on speech related conduct or on the time, place, and manner of speech.¹⁸¹ A regulation survives this intermediate level of scrutiny if: (1) it is within the constitutional power of the government; (2) it is in furtherance of an important or substantial governmental interest; (3) the governmental interest is not the suppression of expression; and (4) the burden on speech is no greater than necessary to advance the governmental interest.¹⁸² This test applies to content-neutral restrictions and

"[r]equires the government to demonstrate that its asserted interests are real and that the restriction on speech will further those interests in a 'direct and material way'."¹⁸³ The Supreme Court has applied this scrutiny level in reviewing, and ultimately upholding, the FCC's requirement that cable systems carry local broadcast stations.¹⁸⁴

The strictest level of scrutiny in First Amendment jurisprudence is reserved for content based regulations. These restrictions are upheld only if they are "necessary to serve a compelling state interest."¹⁸⁵

b. *First Amendment Standards and Ownership Caps*

The fact that the three standards are not mutually exclusive is evident when attempting to apply the framework to broadcast ownership restrictions. The less-than-thorough reader would apply the rational basis test upon learning that the government has been granted a more intrusive easement into broadcasters' First Amendment rights. The intermediate scrutiny level, however, is reserved for content neutral restrictions. There is no guidance on which standard takes precedence when the regulation in question possesses both attributes, as do the ownership ceilings.

The Judiciary's confusion on the issue is evident upon an examination of cases involving content-neutral broadcast regulations. In *NBC v. United States*, the Court upheld the regulation of the relationship between broadcast stations and networks in the face of First Amendment challenges.¹⁸⁶ In so holding, Justice Frankfurter explained the broadcast facilities "are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the

¹⁷⁴ U.S. Const. amend. I.

¹⁷⁵ *Turner Broad. Corp. v. FCC*, 114 S.Ct. 2445, 2456 (1994).

¹⁷⁶ *FCC v. Nat'l Citizens Comm. for Broad. Sys. Inc.*, 436 U.S. 775, 796.

¹⁷⁷ *Red Lion Broad. Co., v. FCC*, 395 U.S. 367 (1969); *NBC v. United States*, 319 U.S. 190 (1943).

¹⁷⁸ *Id.* *FCC v. League of Women Voters*, 468 U.S. 364, 377.

¹⁷⁹ *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 796.

¹⁸⁰ *Id.* The Court explained that the cross ownership ban did not violate the First Amendment rights of those denied broadcast licenses because the regulations were a reasonable means to further the public's interest in diversity.

¹⁸¹ *Ameritech Corp. v. United States*, 867 F.Supp 721, 733 (N.D.Ill. 1994).

¹⁸² *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (Four-part test established for regulations on speech related conduct). *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (three-prong test to be applied to restrictions on the time, place, and manner of speech). Although *Ward's* three-part test is slightly different from the *O'Brien* test, "the Supreme Court considers the two tests to be roughly the same." *Ameritech*, 867 F.Supp at 734.

¹⁸³ *Ameritech*, 867 F.Supp at 733.

¹⁸⁴ *Turner Broad. Corp. v. FCC*, 114 S.Ct 2445 (1994). (The Court found "the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech."). *Id.* at 2469.

¹⁸⁵ *R.A.V. v. City of St. Paul*, 112 S.Ct 2538 (1992).

¹⁸⁶ 319 U.S. 190 (1943).

many who apply.”¹⁸⁷ In *Community-Service Broadcasting v. FCC*, however, the court did not adopt such a deferential standard of review.¹⁸⁸ The issue for the court was whether it violated the First Amendment to require non-commercial educational radio and television stations which received federal funds to record “all broadcasts in which any issue of public importance [was] discussed.”¹⁸⁹ In concluding that the regulation did violate the First Amendment, the majority determined the restriction was a content-neutral restraint on First Amendment freedoms and applied the intermediate scrutiny level, even though the regulated medium was broadcast.¹⁹⁰

Despite cases like *Community-Service Broadcasting*, the most offered explanation for why ownership restrictions, and broadcast regulations in general, do not violate the First Amendment is that the scarcity of spectrum necessitates regulation to achieve diversity.¹⁹¹ Curiously, the FCC long ago abandoned the scarcity rationale as warranting any content based regulations. For example, “an explosive growth in both the number and types of [media] outlets in every market . . .” caused the FCC to eliminate the Fairness Doctrine a decade ago.¹⁹² In passing the 1996 Act, Congress echoed the opinion of the FCC that scarcity is no longer a concern in today’s telecommunication industry.¹⁹³ This is the foundation upon which Congress substantially demolished the ownership restraints.

Also demolished, however, was the armor protecting ownership restrictions from constitutional attack. If the spectrum is no longer scarce, then there is no longer a justification for erecting barriers to enter the broadcast marketplace. It follows that, if the remaining constitutionally infirm own-

ership ceilings are challenged under the First Amendment, the government will have to advance a new justification for its legislation. Since scarcity is the reason relaxed scrutiny was traditionally applied to broadcasting and scarcity no longer exists, the government’s interest will need to be more than just permissible.

2. Equal Protection and Ownership Restrictions

Returning to the constitutional challenge at issue, the disparate treatment between television and radio could well be subjected to strict scrutiny. As the absence of scarcity increases, ownership restraints become more suspect under the First Amendment and the involvement of a fundamental right is more apparent.

The next step, then, in answering the critical question of “whether there is an appropriate governmental interest suitably furthered by the differential treatment,”¹⁹⁴ is to see if the government’s interest is “compelling.” The proposed purpose of the 1996 Act is “to promote competition.”¹⁹⁵ As demonstrated earlier, relaxing ownership caps stifle, not promote, competition. “Certainly, a governmental interest, no matter how substantial in and of itself, cannot serve to justify a statutory classification when the interest is not in fact one which is truly furthered by the statute.”¹⁹⁶ Accordingly, whether promoting competition is a compelling government interest is moot.

The search then begins for an alternative governmental interest in establishing an audience reach cap for television. First, Congress may have sought to restrict the pervasiveness of one broadcast voice in order to ensure diversity at a national

¹⁸⁷ *Id.*

¹⁸⁸ 593 F.2d 1102 (D.C. Cir. 1978).

¹⁸⁹ *Id.* at 1104.

¹⁹⁰ *Id.* at 1114.

¹⁹¹ *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 779 (1978); *FCC v. League of Women Voters*, 468 U.S. 364, 376 (1984); One justification for FCC imposed barriers to broadcasting is that the Communications Act regards the “Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.” *NBC v. United States*, 319 U.S. 190, 215-16 (1943).

¹⁹² In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, *Memorandum Opinion and Order*, 2 FCC Rcd. 5043, n.88 (1987).

¹⁹³ “The availability of a multitude of video outlets – cable, wireless cable, DBS, and the imminent entry of telephone companies offering video dialtone – evidences the fact that the duopoly rule has outlived its usefulness.” 142 CONG. REC. H 1164 (1996); “The local media marketplace has undergone a breathtaking transformation. This has been characterized not only by a large increase in the number of broadcast stations (up one-third in the last decade alone), but more significantly by an onslaught of new multichannel rivals to traditional broadcasters, such as cable and satellite systems, and soon, video dialtone networks.” 142 CONG. REC. 1163 (1996).

¹⁹⁴ See *supra* note 167 and accompanying text.

¹⁹⁵ The 1996 Act, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C.A. § 151 (West Supp. 1996)).

¹⁹⁶ *Community-Serv. Broad. of Mid-Am. v. FCC*, 593 F.2d 1102, 1123 (1978).

level. Implementing the objectives of the First Amendment is clearly a compelling interest. Unfortunately, the means are far from narrowly tailored, which is required under the strict scrutiny test. The restriction is under-inclusive¹⁹⁷ because, by not placing a parallel limitation on radio, one broadcast voice can reach all of America. There are no differences between television and radio to justify this discriminatory practice. Although the FCC is guilty of imposing disparate restrictions on the similar mediums, its actions have bolstered the proposition that television and radio are very similar.

The FCC's justification for adopting the one-to-a-market rule in 1970 was diversification.¹⁹⁸ The same year, the FCC instituted its regulation barring television broadcast stations from owning cable systems in the same market.¹⁹⁹ The FCC did not proscribe common ownership of daily newspapers and broadcast stations until 1975.²⁰⁰ This regulatory scheme suggests that the FCC clearly viewed television and radio to be similar. Radio was the only non-visual medium to be regulated with respect to ownership of visual mediums. By choosing only radio from the media mix and placing it with the audio-visual mediums of broadcast and cable, the Commission was silently screaming that radio and television, whether delivered via broadcast or over cable wires, were similarly situated.

Twenty years later, the Commission is still declaring that television and radio are equals. "Radio has many of the attributes of television . . . and may be substitutable for diversity concerns."²⁰¹ In particular, the FCC explains that both mediums

are free, possess public interest obligations, and act as vital sources of information.²⁰²

Although the Commission does note one difference between the two broadcast mediums, the dissimilarity does not justify the discriminatory regulation. The FCC suggests that the reason more people rely on television than radio as news sources is due to the latter's compelling visual dimension.²⁰³ Even if this theory is accurate, it does not translate into a compelling reason for Congress to prefer the wider distribution of aural messages. Advancing the persuasiveness of audio-visual messages as a reason to limit their distribution implies that persuasive communications are somehow detrimental to the public good. Persuasiveness, however, is not inherently dangerous. More importantly, deciding what does or does not persuade is personal to the individual and, since the government cannot get inside the consumers' mind, attempting to restrict distribution is not a narrowly tailored means of controlling influential messages. From this perspective, the audience reach cap is under-inclusive²⁰⁴ for there are far more sources than just television that disburse persuasive messages.

The only remaining difference between radio and television is that there are more radio stations. While this might justify different numerical ownership caps in order to achieve equal maximum percentages of control, it does not give the government a license to decide which messages should be heard by a greater percentage of the nation. Clearly the 35% limitation on televised communications is not equivalent to the 0% limitation on radio.

¹⁹⁷ In equal protection jurisprudence, courts often discuss whether the classification at issue is under- or over-inclusive. A classification is under-inclusive if "[a]ll who are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include; [that is,] the classification does not include all who are similarly situated." Joseph Tussman & Jacobus and Broek, *The Equal Protection of the Laws*, 37 CAL. L. REV., 341, 348 (1949). An over-inclusive classification, on the other hand, is one which "imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims." *Id.* at 351. The Court's tolerance for under- or over-inclusive classifications fluctuates with the level of scrutiny applied. In applying the rational basis test, the Court has upheld under-inclusive classifications explaining that Legislatures may achieve their goals step by step. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955). Similarly, the Court has approved over-inclusive legislation when applying the deferential rationality test. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (up-

holding an over-inclusive classification because "rational distinctions may be made with substantially less than mathematical exactitude"). In strict scrutiny analysis, however, the Court will invalidate laws based on under- or over-inclusive classifications. *See, e.g., Rimmer v. Colt Indus. Operating Corp.*, 495 F.Supp. 1217, 1228 (W.D.Mo. 1980) (applying strict scrutiny and striking down Missouri law as violative of the Constitution's equal protection clause because it was both under- and over-inclusive).

¹⁹⁸ 1970 *First Report and Order*, *supra* note 47, at 311.

¹⁹⁹ *In re Amendment of Rules Relative to CATV*, *Second Report and Order*, 23 F.C.C. 816 (1970).

²⁰⁰ *In re Amendment of Rules Relating to Multiple Ownership of Std., FM, and TV Stations*, *Second Report and Order*, 50 F.C.C.2d 1046 (1975).

²⁰¹ 1995 *FNPRM*, *supra* note 4, para. 68.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *See supra* note 197.

Even if, in the absence of scarcity, the ownership restrictions could withstand a First Amendment challenge, thus lowering the equal protection scrutiny to a rational basis test, the disparate treatment could not stand. There is nothing rational about an under-inclusive law or one that distinguishes between two mediums that are equally capable of promoting or destroying diversity.

V. CONCLUSION

In passing the 1996 Act, one legislative skeptic stated, "I hope we don't discover later that we've lost sight of the public in this process and of the need to protect the public from potential monopoly abuse."²⁰⁵ The general relaxation of ownership restrictions, which has resulted in concentrated control of broadcast facilities, makes this concern a reality. Further, the idea of broadcasting in the public interest, through local and diverse programming, is overshadowed by the ab-

sentee group owners' interests in building media empires. Senator Pressler boasted that his bill would cause an "explosion in new investment and development," and the consumers to be the winners.²⁰⁶ Unfortunately, Mr. Pressler's predicted explosion did occur, however, the fallout, not the benefit, is on the consumers.

Besides losing sight of the public interest in enacting the 1996 Act, Congress violated the very document that gave it life. Although ownership caps have been upheld under the First Amendment, based on a now questionable scarcity rationale, it does not follow that this past approval clothes them in armor sufficient to withstand constitutional attacks of a different nature. The disparate treatment between radio and television results in the government favoring purely aural messages over their audio-visual counterparts. The distinction is void of any principled rationale, and fails to survive an equal protection challenge under even the most deferential scrutiny.

²⁰⁵ 142 CONG. REC. S 687 (1996).

²⁰⁶ 142 CONG. REC. S 2207 (1996).

